Supreme Court, U.S.
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NO. 85-889

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1986

THE STATE OF COLORADO,
Petitioner,

v.

STEVEN LEE BERTINE,
Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF COLORADO

JOINT APPENDIX

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CERTIORARI GRANTED MARCH 24, 1986

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NOTE:

The Opinion of the Colorado Supreme Court appealed here appears as Exhibit A to the Petition for Writ of Certiorari and is not reproduced here.

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

DISTRICT COURT, BOULDER COUNTY STATE OF COLORADO

DATE	PROCEEDINGS
02-16-84	Complaint filed
03-12-84	Preliminary hearing held and defendant bound over to the district court
05-08-84	Defendant arraigned in the district court, not guilty plea entered, and motions and trial dates set
07-10-84	Hearing on defendant's motion to suppress search of defendant's backpack and order granting that motion
07-19-84	Notice of Interlocutory Appeal filed
	COLORADO SUPREME COURT
09-30-85	Decision reported by Colorado Supreme Court
10-01-85	Remittitur to trial court
10-16-85	Remittitur vacated upon the People's motion
	UNITED STATES SUPREME COURT
11-22-85	Petition for Writ of Certiorari filed
03-24-86	Petition for Writ of Certiorari granted

PEOPLE OF THE STATE OF COLORADO
V.
STEVEN LEE BERTINE
DISTRICT COURT, COUNTY OF BOULDER,
STATE OF COLORADO

I. Defendant's Motion To Suppress:

Defendant, being a person aggrieved by an unlawful arrest, search and seizure, moves to suppress for use as evidence all items obtained by said arrest, search and seizure and all other evidence obtained as a result thereof on the following grounds:

1. On February 10, 1984, the Defendant was arrested and his van was searched by officers of the Boulder Police Department.

2. The Defendant's warrantless arrest was made without probable cause.

3. The search was conducted without a search warrant and without probable

cause to search for evidence or contraband.

4. The police have alleged that the search was justified by the inventory search exception to the legal requirements for a search warrant.

5. During the search the police seized and searched a closed backpack and other closed containers found therein. The contents of the closed containers found in the Defendant's van are the controlled substances alleged in the charges herein.

6. The search of Defendant's van was not pursuant to a valid inventory search.

7. The search of the closed backpack and other containers exceeded the

scope of a valid inventory search. See People v. Counterman, 556 P.2d 481 (1976).

8. For the above reasons and otherwise, the search and seizure was in violation of C.R.S. 16-3-101 et seq.; Rule 41 of the Colorado Rules of Criminal Procedure; Article II, Section 7 of the Colorado Constitution; and the Fourth and Fourteenth Amendments of the United States Constitution.

II. Excerpts from Reporter's Transcript of Suppression Hearing In The District Court, Boulder County On July 9 and 10, 1984.

Testimony of Officer Toporek

DIRECT EXAMINATION BY MR. HARIED

[p.3, l.16 - p.15, l.23]:

MR. HARIED: All right, I would call Officer Toporek.

JULIUS TOPOREK,

called as a witness by and on behalf of the People, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. HARIED:

Q Would you state your name, please.

A Julius Toporek

Q Spell your last name for the court reporter, please.

A T-o-p-o-r-e-k.

Q How are you employed?

A I am a police officer for the City of Boulder.

Q In February of 1984 were you employed in that capacity?

A Yes, sir, I was.

Q I want to direct your attention to February 10, 1984, the early morning hours of that day. At that time, did you arrest the defendant in this case, Steven Bertine?

A Yes, sir, I did.

Q Do you see that person in the courtroom?

A Yes, sir, I do.

Q Can you identify him for the judge, please.

A He is the gentleman with the long red hair, beard, glasses, sitting at the defense table.

MR. HARIED: I would ask the record to reflect the identification of the defendant.

THE COURT: It does.

Q (BY MR. HARIED) Where did that arrest occur?

A It occurred on Broadway just a little north of Baseline, City of Boulder, County of Boulder, State of Colorado.

Q Where did you first -- where were you when your attention was first called to Mr. Bertine?

A I was at the intersection of College and Broadway in Boulder.

Q That's right across from the University, on the hill?

A Yes, sir, it is.

Q What drew your attention to him?

A At that time I was stopped or at a red signal at that intersection. I observed the defendant's vehicle traveling southbound down Broadway at a high rate of speed.

Q How could you tell it was at a high rate of speed?

A It was going a lot faster than the rest of the traffic on Broadway at that time.

Q Can you say 5 miles an hour faster? 15?

A I would estimate anywhere from, say, 10 to 15 miles per hour faster.

At that time I be began to follow the Defendant's vehicle at which time I noticed him to change lanes without signaling, going in and out of traffic.

Q Where were you stopped and which way were you headed?

A Broadway as it comes along around the hill, makes like a T intersection. He is traveling southbound and I proceeded southbound following him towards Baseline Road.

THE COURT: You were on College stopped for the light?

THE WITNESS: Yes, sir.

THE COURT: Thank you.

Q (BY MR. HARIED) At that intersection, as I recall, that's a right turn only for southbound Broadway?

A That's correct. So as I followed him I observed him make several lane changes in and out of traffic and continuing to travel at a high rate of speed.

Q How many lane changes?

A I would say at least two to three that I can be for sure of.

Q Did he signal for any of those?

A No.

Q Okay.

A And then during the time it took my vehicle to catch up, my speedometer averaged between 50 and 55 miles per hour. My vehicle was somewhat paced with his. At which time I then accelerated, turned the emergency equipment on and made contact with him.

* * *

Q What is the speed limit on that section of Broadway?

A 30 miles an hour.

Q You started to say you turned on your overhead lights and pulled this car over. Can you describe what happened at that time?

A At that time I contacted the driver of the vehicle.

Q Okay. How far north of Baseline Road were you when Mr. Bertine's car stopped and you pulled up on him?

A I would say probably 100 yards or within 100 yards.

Q Okay. Can you describe the southbound roadway at that point? How many lanes is it? Is there parking there? Are there public parking lots off of that area?

A At that stretch of the road, I believe it's just two lanes going southbound at which point when it gets closer to the intersection, you then have a right-hand turn lane, and had two left-hand turn lanes. Where we are stopped there was, I believe, two lanes southbound and there was no parking lane area in that stretch of the road.

Q Is that a side road or a main traveled highway at that point?

A It's a main traveled highway, it's 93.

Q What happened when you contacted the driver?

A When I contacted the driver I asked him for his driver's license and registration.

Q Who was driving?

A The defendant, Steven Bertine.

Q Was there anyone else in the car?

A Not human.

Q There was another -- there was an animal?

A There was a dog, yes.

Q Can you describe your contact with Mr. Bertine when you asked him for his driver's license? And tell us what things you saw and did after that point.

A As far as a contact, it was pretty much routine. Upon talking with Mr. Bertine, I did notice that there was a strong odor of alcoholic beverage upon his breath. Upon further observation I realized that his eyes were somewhat watery or glassy.

Q Let me stop you right there. This was about what time of the day?

A It was about ten minutes after midnight.

* * *

Q What else did you observe about Mr. Bertine at that time?

A Upon having conversation with him, I realized that his speech was somewhat slower than I would say a normal person would talk.

Q Can you characterize that? I mean, was it dragged out, or was it just in the continuum of fast and slow it was just slow?

A I would say slow and somewhat dragged out.

Q Anything else you noticed about Mr. Bertine at that time?

A No, sir, not at that time, as I recall.

Q Did you be begin to form any kind of opinion about his condition at that time

based upon your observations and conversations with him?

A Yes, I did.

Q What was that?

A Given in my impression the careless driving, the high rate of speed through the busy intersection of college and Broadway, his going in and out of traffic, his speed, strong odor of an alcoholic beverage, I believed at that time that he was under the influence of an alcoholic beverage.

Q What did you do after you had gotten his driver's license from him?

A After I had obtained the information, I then noticed our communication center that I believed I had a possible DUI, drunk driver, intoxicated driver. And at that time they sent me a back up vehicle.

Q What happened at that time?

A I then requested the defendant to step from his vehicle and asked him to

perform a roadside test, if he would be willing to do so.

* * *

Q What were the maneuvers you asked him to do?

A The four maneuvers that I had him do was first to recite the alphabet, A through Z. I had him then do the finger to nose. The third was the heel to toe walking. And the fourth was the Romberg test.

Q Have you ever conducted these maneuvers with other people on the street before?

A Yes, sir, I have.

Q Approximately how many times?

A I would say at least 50 times.

A Have you had any training in evaluation of these kind of maneuvers -- to educate yourself, judgment about whether a person was affected by alcohol or not affected?

A Yes, sir, I have.

* * *

Q Based on all of the observations you made up to that point about Mr. Bertine and his behavior and mannerisms, did you reach any kind of conclusion about his condition?

A Yes, sir, I did.

Q What was that?

A That he was intoxicated.

Q In your opinion, when you say intoxicated, does that mean that he was not capable of safely driving a car?

A That is correct.

Q What happened after that point?

A After the last maneuver was completed, I had the defendant face Officer Reichenbach, at which time I had him place his hands behind his back, advised him that I was arresting him for an alcoholic related offense and transported him down to the Boulder County Jail.

Q Officer Reichenbach was there at that time. Do you know at what point in this procedure he arrived?

A I believe he arrived right after I had done the first maneuver, reciting the alphabet.

Q Did you have any discussion with Officer Reichenbach. There was another officer there. Shiffano?

A That's correct.

Q Did you have any discussion with either of them about impounding the vehicle, not impounding it?

A Yes.

Q What was that?

A Upon taking the defendant into custody, I asked Officer Reichenbach if he would go ahead and impound the defendant's vehicle for me.

Q What was the reason that the vehicle was impounded? Reason or reasons?

A There was several, you know. One is that pursuant to Boulder revised statutes

that when a driver is arrested from his vehicle, it's authorized that the vehicle can be impounded.

Q When you say Boulder, you mean Boulder Municipal Code?

Q Yes, sir. Boulder Municipal Code 772. Also where the vehicle was parked, was not legal, and for a traffic hazard at that place, the car it was also secured.

Q Not legal because that's a traveled portion?

A Right. There is no parking there on Broadway.

Q At that time, I take it Mr. Bertine was put into your patrol car?

A That is correct.

Q And you drove him to the Justice Center?

A Yes, sir.

* * *

TESTIMONY OF OFFICER REICHENBACH

DIRECT EXAMINATION BY MR. HARIED

[p.17, l.6 - p.32, l.20]:

MR. HARIED: Call Officer Reichenbach.

PAUL REICHENBACH,

called as a witness by and on behalf of the People herein, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. HARIED:

Q Can you state your name, please.

A It's Paul Reichenbach. R-e-i-c-h-e-n-b-a-c-h.

Q What's your employment?

A Police officer with the City of Boulder.

Q Were you a police officer in February of 1984?

A Yes.

Q Were you present at the time of the arrest of the defendant in this case, Steven Bertine, on February 10, 1984, as described by Officer Toporek?

A Yes, I was.

Q You were, as I understand it, a back-up officer at that time?

A That's correct.

Q What did you do after -- do you recall the conversation with Officer Toporek about impounding the car?

A I don't specifically remember him asking me to impound it, no.

Q At some point a decision was made to impound it?

A Yes.

Q What did you do? What were the first things you did do?

A The first thing I did, I called animal control because there was a dog inside of it.

Q Can you describe the vehicle? It hasn't been described yet?

A It was an old, I believe a Suburban, something like that, a large vehicle.

Q Okay. The inside passenger compartment area, are there seats? What's inside of it?

A Inside of the truck is a one seat. It's a bench seat in the front that runs from the driver's door to the passenger door. Behind that is open space, no seats behind the first seat.

Q How long did it take for animal control people to come?

A They got there pretty quick. Five to ten minutes I would say after I called them.

Q Is that -- if you find -- if you are going to impound a vehicle that has an animal, is it common to do that?

A Yes.

Q So they can take the dog?

A Yes.

Q How -- five or ten minutes went by. They showed up. They opened the car, took the dog out. Okay, what did you do after that point?

A Requested a tow truck and went into the vehicle to inventory the property inside of it.

Q Let's talk a minute about the purposes of an inventory of a vehicle that's about to be impounded. What is the reason that you do an inventory under those circumstances?

A Well, the vehicle was not legally parked, so I was going to impound it.

The reason we do inventories is to protect the defendant, the person that's been arrested from having any valuables stolen from within the vehicle, to insure that whoever takes the vehicle doesn't take anything that is inside of it.

Q Do you mean the tow truck?

A Yeah, the tow truck company or any of the employees.

Q What other reason in your department do you conduct inventories when a car is impounded?

A Just to look for personal items of value.

Q You said the protection of the owner was one thing?

A Right. Protection of the police department, so that the person doesn't come back and claim that there was something of value taken from within the vehicle. Try to sue the department or the officer.

Q Is there a third reason?

A I would say to protect the -- or to insure that the tow company doesn't go in or somebody go in and take something.

* * *

Q (BY MR. HARIED) You said one reason is to protect the owner of the car from having valuable items taken from his car. Another reason is to protect the police officer and the towing company from being sued by the owner of the car if he later claims something was in there and is now missing.

Is there any other reason that you have been instructed as a reason or you yourself deem to be a proper reason for conducting an inventory of a car that's going to be impounded?

A For any dangerous items such as explosives, weapons.

Q Have you ever found such items in a car before?

A Yes.

Q Were these the purposes for which you are going to do the inventory of this car in this car?

A You bet.

Q How did you initiate -- what was the first thing you did in doing the inventory once the dog had been removed?

A Just first just look through the truck real quickly to see.

Q Look at the outside or the inside?

A Look at the inside, rather. Just gave it a real quick once over. Looked in

the front, looked down the seat, looked in the back.

Q You used a flashlight for that?

A I had one with me. By this time, we had our spot light in the back window and it wac pretty well lit.

Q Okay. Were you inside the car when you did this?

A Either just standing outside the door or up on the front seat.

Q Okay. What did you see you took note of inside the car?

A There was some jumper cables, a tire, a shovel, a brown backpack, a three-quarters full can of beer. That was about it. There wasn't whole lot inside.

Q Okay. I want to hand you what I have marked as People's Exhibit A. Is that the vehicle impound record you did for this car?

A Yes, it is.

Q Okay.

A It's a copy of one.

Q On there you've noted items found in the vehicle. Is that right?

A Yep.

Q And the condition of the external portion of the vehicle?

A Yes.

MR. HARIED: I would move the admission of People's Exhibit A.

MR. LACKLEN: No objection.

THE COURT: Be received.

(People's Exhibit No. A was admitted into evidence.)

Q (BY MR. HARIED) Where did you find this brown backpack that you mentioned?

A It was directly behind the front bench seat right about in the middle of the vehicle.

Q What did you do -- what was the first thing you did with the brown backpack?

A Picked it up.

Q Was it empty, lying flat, full? Did it appear to have items in it? What did you observe about it?

A It appeared to have items inside of it.

Q Can you tell whether they were heavy items, light items like envelopes, couple scraps of paper or something?

A It seemed to be something more significant than paper.

Q How long have you been a police officer in the City of Boulder?

A Three and a half years now.

Q Okay. How much of that time have you worked as a patrol officer?

A About almost two years.

Q Okay. during that time have you come into -- have you arrested people, come into contact with people where you have had cause to search a backpack before in this town?

A Where I have looked through backpacks, yes.

Q Can you describe, based on your experience and training, how people in this community use backpacks, whether they are simply used to carry say climbing gear or whether they are used for more more general purposes?

A The average person on the street in the city carries items of personal value in the backpacks, wallets, checkbooks, text books. It's a whole variety of personal items.

Q Cameras?

A Cameras, cosmetics.

Q Calculators?

A Sure.

Q A lot of students in this town?

A Yes.

Q What did you do with the brown backpack once you found it?

A Picked it up and opened up the top zipper portion of it.

MR. HARIED: I'd like this to be marked as People's Exhibit B, please. I can mark it, actually.

Q (BY MR. HARIED) I hand you what I have just marked as People's Exhibit B. Can you identify that please.

A This is the backpack that was directly behind the bench seat in Mr. Bertine's vehicle.

Q Contains some of the items now that were originally found in it?

A Yes.

Q But it doesn't contain everything that was originally found in it?

A No, it does not.

Q As I understand a couple of the items are in the police laboratory right now being fingerprinted?

A Correct.

* * *

Q (BY MR. HARIED) Okay, Mr.. Reichenbach, I'm going to hand you, again,

what was marked as People's Exhibit B and I'm going to mark these as C and D.

I am handing you People's Exhibit C. Can you identify that, please.

A It's one of the tin cans that I found inside the backpack.

Q Okay. People's Exhibit D, etcetera?

A That's another one of the cans that I found inside the backpack.

Q Can you look inside Exhibit B, can you look see if it contains except for Exhibit C and D, if the backpack contains all of the items that were in it when you first opened it?

A (Complied.) I believe so.

Q For everyone's benefit, I'm going to mark some of these additionally. I will mark this small tan and brown bag as People's Exhibit E. The record should indicate that that was just pulled from Exhibit B by Officer Reichenbach.

I will mark as Exhibit F, a tin can of Irish Mocha Mint Coffee beverage. Similarly just pulled from the backpack.

As People's Exhibit G, a plastic bag containing a third tin can just pulled from the backpack by Officer Reichenbach.

MR. LACKLEN: I'm sorry, what was E?

MR. HARIED: It was this tan and brown zippered nylon bag.

It is -- I will mark as D, the flashlight. And as I, the brush, with H and I, the previous exhibits having just been pulled from the backpack.

MR. HARIED: Your Honor, I move the admission of Exhibits B through I.

MR. LACKLEN: No objection.

THE COURT: They will be received.

(People's Exhibits B through I were admitted into evidence.)

Q (BY MR. HARIED) At the time you first picked up and felt the backpack, all of these items were inside of it?

A Yes.

Q Items C through I?

A (Pause.)

Q Oh, I'm sorry, I didn't mark one. There is another plastic bag that was just pulled from the backpack. I will mark that as J. It's a plastic bag containing white paper stapled shut. Do you know what's inside the white paper, Exhibit J?

A I believe it's contact lens stuff, personal items, nail clippers, things like that.

Q Were those taken from the backpack?

A As far as I can remember they were taken from this front pouch of the backpack.

Q Just so the record is clear, the backpack has two compartments. One a main compartment, and two small pouches on the outside with a zipper.

An that's what Officer Reichenbach has just pointed to. I would also move the admission of Exhibit J.

MR. LACKLEN: No objection. What was I?

THE COURT: I is the brush. Exhibit J is received.

(People's Exhibit No. J was admitted into evidence.)

MR. LACKLEN: Okay.

Q (BY MR. HARIED) So as I understand it, C through I were in the main compartment and those items in J were in the outside compartment?

A Yes.

Q What did you do after you had picked the backpack up and felt there were some items inside?

A Opened the main zippered compartment.

Q Why did you do that?

A Look for personal items of value, explosives, weapons, things like that.

Q And what was it that lead you to believe that such items might be inside the backpack?

A I found items like that before in the past in backpacks.

Q What did you see when you opened the top of the main compartment?

A I saw the brush, the flashlight and Exhibit E, which was closed.

Q It was closed?

A Yes.

Q Okay. What did you do after you looked inside?

A I pulled this out and opened it up.

MR. LACKLEN: I would ask the record to reflect that he is referring to Exhibit E, the tan brown zippered nylon bag?

A Yes, Exhibit E.

THE COURT: Exhibit E, yes.

Q (BY MR. HARIED) Was the zipper fully zipped closed when you first found it?

A As I remember, yes.

Q What did you do then?

A I opened the zipper on Exhibit E.

Q What was the reason for doing that?

A Again, to look for weapons, explosives. Items of value.

Q What did you see when you looked inside Exhibit E?

A I saw People's Exhibit G, C and D on top of one another, and People's Exhibit F.

Q Okay. Those are the three tin cans?

A Three silver tin cans and the Irish Mocha Mint can.

Q What did you do once you saw those items?

A Opened the silver can that was on top.

Q Of those three, do you remember which one was on top without looking at them?

A I'd need to look at the property report.

Q Okay. When you found the one on top, was it -- so the record is clear, these are tin cans that have a bottom can portion and a lid with two clips on each end to seal the lid to the can.

When you found those, were the clips up and the cans closed?

A The tops were on the cans and the clips were closed securing the cans.

Q So you opened the top?

A Yes.

Q What did you see at that time?

A Cocaine paraphernalia.

Q Can you be more specific?

A I believe there was a little glass tube in it that's used for -- it appeared to be smoking cocaine. I can't specifically remember what else was in it. Possibly a razor blade, items like that.

Q You said cocaine paraphernalia. Do you have any background experience in dealing with those kinds of items that you would classify as cocaine paraphernalia?

A Yes, I worked undercover in the Boulder Police Department drug unit for 15 months. I attended a class given by the United States Drug Enforcement Administration, initiation of cases, the

whole gamut of undercover work including identification of controlled substances, field tests, identifying paraphernalia. Just the whole gamut of drug work.

Q What did you do after you discovered these items in the first can?

A I believe I sealed that can and looked through the rest of the tin can.

Q Seal it, you mean you closed it?

A Closed it.

Q You didn't put tape on it?

A No, I just put tape on it --

Q What was in the other cans?

A Had a bunch of folded paper bindles. Each labeled either one-quarter or one-eighth.

Q What is bindles [sic]?

A A bindle is a folded piece of paper which is just had -- generally used to contain controlled substances. Package and carry controlled substances.

Q The numbers one-eighth, one-quarter, do they mean anything to you based on your training and what you observed?

A Yes, they mean the approximate weight of the controlled substance inside. Meaning a quarter gram or whatever else it's labeled.

A I think I might have misspoke. I can't remember if they were labeled one-quarter and one-half or one-quarter and one-eighth. It was either/or.

Q Did you open up any of the bindles to see if anything was inside of them?

A At the scene, I believe I opened one of them, and it appeared to be cocaine.

Q Okay. What did you do with the items that have been admitted, B through J, after that time?

A Put them all back in the backpack, and took them into corrections.

Q Okay.

Q What was done with the vehicle after you completed your inventory?

A It was towed by, I believe, Buff's Conoco.

Q At the time that you started the inventory, taking the dog out, and then going through the car yourself, did you have any reason to believe that Mr. Bertine had committed any crime other than the driving under the influence that he was arrested for? Anything that caught your attention? Any reason you saw that you might suspect that there were drugs in the car?

A No, not until I opened the first can.

Q How long did it take you to complete your inventory once the dog had been removed?

A I would guess from the time the dog was taken out, until the tow truck took the car, it was 20 or 25 minutes. I'm sorry, from the time I requested the animal control officer to come, until the car was towed was 20 or 25 minutes.

Q You are not saying you were going through the car for that period of time?

A No.

Q The actual search that you performed took how long?

A Ten minutes.

Q I'm going to hand you what has been marked as People's Exhibit K. Before I do that, do you know if your department has any written policies governing impounds of vehicles?

A Yes, it does.

Q I'm going to hand you Exhibit K and ask you if you can identify that, please.

A It's a copy of general procedure number 77-GP, as George, Paul,-0-19 entitled Motor Vehicle Impounds, the Boulder Police Department.

Q As part of your training have you been instructed in that policy and the general policies of your department concerning impounds?

A Yes.

MR. HARIED: I would move the admission of Exhibit K.

MR. LACKLEN: No objection.

THE COURT: It will be received.

(People's Exhibit K was admitted into evidence.)

MR. HARIED: I don't have any other questions of this witness.

* * *

CROSS-EXAMINATION BY MR. LACKLEN [p.35, l.9 - p.75, l.14]:

Q You have told us that one of the exhibits has been marked now People's Exhibit J is the things that you found in the front pouch?

A Correct.

MR. LACKLEN: I'd like the record to reflect that I am opening the sealed white envelope.

Q (BY MR. LACKLEN) Officer, I wonder if you could relate for the record what's

just been removed from the white envelope marked as People's Exhibit J?

A A master lock, a plastic bottle containing a small amount of fluid, bottle of Sinus Shower, one-half ounce -- one-half fluid ounce, some sort of white -- it's a Binaca breath spray, a can opener, knife, cork screw, a pen, nail clippers, a hair band, a key, colibry filters -- or flints, rather. And a Cobra -- something to do with a telephone.

Q Okay. If you could just put those back in the white envelope and back into the bag for People's Exhibit J.

Officer, there was something else in the front pocket of the large backpack that wasn't listed on your property report and isn't in People's Exhibit J or the white sealed envelope inside People's Exhibit J. That was an envelope -- a sealed envelope marked rent. Do you remember that?

A Yes, I do.

Q Where did you find that envelope?

A I believe that was also in the front pouch.

Q Where is that in your reports?

A It's in the narrative section, I believe.

Q Perhaps I can assist you. Page 2, last paragraph.

A Yes, the last paragraph of page 2 in my narrative.

Q That's the only place in your report that you indicate that there was $210 found in a sealed, white envelope labeled rent. Is that correct?

A Yes.

Q Why did you open that envelope?

A It felt like money.

* * *

Q So that really wasn't the reason why you were opening the envelope. You were opening the envelope because you had previously found drugs in other portions

of the backpack and you were looking to see if this had something to do with the controlled substances you had found?

A I believe you mistook my answer. The reason I opened the envelope was to protect Mr. Bertine and the police department and myself. As I had said before, it felt like cash to me, dollar bills, and I needed or wanted to count how much was there.

Q Because you felt that by counting the cash and opening a sealed envelope you were protecting yourself and Mr. Bertine more than if you left the envelope sealed?

A Yes.

Q Is that true also with the tin cans?

A At that time I was looking for personal items of value, trying to protect Mr. Bertine, yes.

* * *

Q Mr. Bertine's truck was parked near a fire station at the corner of Baseline and Broadway?

A Yes.

Q Heading south; is that correct?

A Correct.

Q And across the street to the south from that intersection is an office building with a parking lot, is there not?

A Yes, on the southwest corner.

Q And on the south -- on the northeast corner is a park; is that correct? Part of the University?

With the big sculpture.

A It's a little traffic island, yeah, or a triangle.

Q And beyond the traffic island it's part of the University grounds?

A Yes.

Q And on the south east corner of that same intersection is the Basemar Park Shopping Center, which has hundreds and hundreds of parking spaces; isn't that correct?

A Yes.

* * *

Q If this had been a passenger car, would you have checked in the trunk?

A No.

Q No. You wouldn't have opened a locked trunk?

A No.

Q Why is that?

MR. HARIED: Objection. Not relevant.

MR. LACKLEN: I think it's relevant, You Honor.

THE COURT: Overruled.

Q (BY MR. LACKLEN) Officer, if you were searching a vehicle -- if Mr. Bertine had been driving a regular sedan with a normal trunk that wasn't accessible from the passenger compartment, why wouldn't you have searched that?

A Why would I not have searched that?

Q Inventoried the things in the trunk.

A Those items were not in his control when he was stopped. There would have

been no possibility that he could have used a weapon or whatever from that location.

Q Well, I'm talking about an inventory of a car that's being impounded. Would you have searched the trunk?

A No.

Q So are we just talking about the things that are in the defendant's immediate control?

A In the passenger compartment.

Q How are you protected against false claims or theft if you don't search the trunk?

A I have never searched trunks without search warrants. And I can say that with no doubt in my mind. So, whatever was in the trunk, would have been taken, if somebody puts a claim to it, after the vehicle left my custody.

* * *

Q You never discussed with Mr. Bertine what he wanted done with his car at all, did you?

A No.

* * *

Q What was Mr. Bertine's demeanor at the time of your observation of him?

* * *

A Cooperative.

Q He wasn't threatening or abusive to you or Officer Toporek?

A Not at all.

Q You didn't particularly think that he looked dangerous or that you suspected any weapons or any dangerous instrumentalities in the car from his demeanor or any observations before you began inventory?

A I couldn't say what I expected just by looking at him.

* * *

Q Officer, you talked about your experience in searching backpacks in Boulder county: is that correct?

A (Witness indicated.)

Q How many backpacks do you think you have searched?

A 30 to 50, I would guess.

Q How many of those backpacks have contained explosives?

A If you would consider fireworks explosives, maybe 5 or 10.

Q How many of them have contained controlled substances or dangerous drugs?

A Quite a few more than that. 20, 25.

Q A large percentage of the backpacks that you have searched have contained controlled substances, isn't that true?

A Around 50 percent, I would guess.

* * *

So when you began the search with the backpack, there was nothing really suspicious about the backpack, was there?

A Not at all.

Q And you know that Mr. Bertine's wallet wasn't in the backpack because it was on the front seat?

A Right.

* * *

MR. LACKLEN: I show you what has been marked as defendant's Exhibit No. P for identification and ask if you can identify that?

A It's a package of evidence tape which I picked up this morning.

Q You brought that to court at our request?

A Yes.

Q Is that the same type that is on the backpack at this time?

A Basically, yes.

Q Officer Reichenbach, would it have been possible with the evidence tape marked as People's Exhibit P or in some other way to have sealed the backpack in its closed condition when you first picked it up without opening any zippers.

* * *

A Are you asking if I could have sealed it without looking in it and then given it back to him?

Q Yes.

A Yes, I could have done it that way.

Q Okay. And in that way, you would be assured that nothing that was in t' backpack the moment you touched it for the first time had left it until it got back to Mr. Bertine; is that right?

A Right.

Q There was no indication as you picked up that backpack that it contained anything particularly valuable, did it?

A Nothing that made me suspect that whatever was inside of it was of any significant value or not of any value.

Q It wasn't particularly heavy, such as a camera or some other --

A I would say it's as heavy as a camera.

Q You never asked Mr. Bertine whether he wanted his car inventoried or not, did you?

A No.

Q You never asked Mr. Bertine whether he wanted his car moved to a public parking lot and moved and locked and left for him to retrieve later did you?

A No.

* * *

Q (BY MR. LACKLEN) Officer, you didn't ask Mr. Bertine if he wanted his car moved to a public parking lot out of the flow of traffic, did you?

A No.

Q Even though one was available catty-cornered to this?

A Yes. There was one on the south side of Baseline.

Q You didn't ask him if he wanted his car moved and locked with the contents as they were?

A No, I didn't.

* * *

Q You don't impound every car in which you make a custodial arrest, do you?

A No.

Q Sometimes you leave the cars on the street?

A If it's legally parked and the consent of the person that's been arrested.

* * *

Q Do you impound every car in which you make a DUI or a driving while ability impaired arrest?

A No.

Q In your opinion, at the time that Mr. Bertine's car was impounded, why was it being impounded?

A It was in traffic. It was on a roadway, not legally parked. There was nobody at the scene that could have taken it, that he could have given consent to

have drive away. And I was not going to move it into a public parking lot.

Q Okay. Did you ask Mr. Bertine if there was someone that could come pick up the car that you could wait there until a friend arrived to move the car?

A No.

Q It's not unheard of for an officer to drive a vehicle from one place to another after a custodial arrest, is it?

A It has been done.

Q Okay. And this automobile was turned over to a private towing company, Conoco, Buff's Towing?

A I believe so.

Q And they took it to their private lot, right?

A I have no idea what happened to it after it left.

Q So you have no idea what kind of protection Buff's Towing provides once they have custody of the vehicle, do you?

A No, I believe according to the City contract that the City has they have to have a secured, locked area.

Q It's part of your inventory after you had seized and searched the backpack you inventoried the rest of the vehicle; is that correct?

A Yes.

Q And that's reflected in People's Exhibit A which lists jumper cables, blanket, sand bag, tire and shovel?

A Any major item other than personal papers and things like that.

* * *

Q After you had opened the backpack to look for dangerous instrumentalities and valuable personal property, you saw three -- you saw a zippered pouch; is that right?

A Yeah.

Q You opened the top for us?

A Yes.

Q This has been marked as People's Exhibit E. This pouch could have been sealed with evidence tape or in some other manner, so that when it was released to Mr. Bertine you could be assured that it hadn't been opened and nothing had been removed; isn't that correct?

A Yes, I could have done it that way.

* * *

Q So there wasn't anything about these containers -- any of these four containers after you had gone through two sets of zippers to indicate that these containers contained anything particularly valuable or anything particularly dangerous?

A I couldn't say one way or the other.

* * *

Q Another alternative to inventorying Mr. Bertine's car would have been to use evidence tape such as we have a sample of in Defendant's Exhibit P to seal all of the doors of the car so that you could be assured that once the car was released

from you that if those seals remained unbroken, that nothing would have been removed from the car; isn't that correct?

A I would have never done that, no.

Q I am asking you if that was possible, Officer?

A I guess somebody could have done it that way, yes.

Q Isn't it a fact that when cars are seized as evidence in a criminal case that sometimes the doors are sealed with that kind of tape to make sure the cars aren't tampered with?

A Yes.

Q Why are the doors sealed with that kind of tape?

A In criminal cases?

Q In a criminal case.

A Just as you said to make sure nobody goes inside of it prior to obtaining search warrants.

Q You didn't feel before Mr. Bertine was removed from the scene that your safety was threatened by him, did you?

A No.

Q And you didn't have any reason to believe that his van contained any explosives, contraband or evidence of a crime, did you?

A Not before I looked in it.

Q Does the Boulder Police Department use different procedures in a driving under the influence custodial arrest than other custodial arrests?

A No, it depends on where the car is located.

Q So if Mr. Bertine had pulled his car into the Basemar Shopping Center, what would you have done with the car?

A Locked it and left it there if he had agreed to that.

* * *

Q People's Exhibit K, the regulations.

Officer Reichenbach, I will refer you to People's Exhibit K and ask you if you recognize that document?

A Yes, it's the same document that I had earlier, the Boulder Police Department Motor Vehicle Impound Procedure.

Q When you seized the backpack and searched it, was your intention to leave the backpack in the car?

A If there had been nothing of contraband or value in it or explosives or anything.

Q So let's eliminate the -- let's eliminate the money and the contraband and deal with the things that were left.

What would have been left in the backpack besides that?

Would you have left the backpack in the van or taken it somewhere else?

A The only items other than money and contraband were personal items, the flashlight, the hair brush, the items that were in the front.

Had -- if those things were the only things in the backpack, I'm sure I would have left the backpack in the truck.

Q And put it on the impound sheet as one backpack containing personal items?

A Right.

Q I want to refer you to subsection two of those procedures. I will tender the copy to the Court just so the Court can follow along.

Subsection 2, what are the Boulder Police Department procedures regarding personal items?

A If it's an item of personal value, it's to be removed and placed into property.

Q Okay. And under subsection 3, there's what is called park and lock procedures; is that correct?

A Yes.

Q And Mr. Bertine's car qualified under all of the requirements of Subsection A, did it not, for park and lock procedure.

A I would say that under III(A)(1) that sentence where it says the vehicle and or it's contents are not themselves the fruit of a crime, nor has a vehicle or it's contents been used in the commission of a crime -- I would say the vehicle was used in the commission of a crime.

Q Well, that's true in any traffic offense, isn't it?

A Yes.

Q So in any traffic offense you don't always impound the car, do you?

A No.

Q So what I am asking you is, there is nothing different about a DUI arrest than there is about any other kind of traffic custodial arrest, is there?

A No.

Q So what I am asking you is, Mr. Bertine's car, even though it was used in the "commission" of a crime, that's not really what the phrase of that subsection means, is it? Otherwise, you would have

to impound every car that was involved in any traffic offense; isn't that right?

A It says under III(A), upon placing the operator of a motor vehicle in custody an officer may take the following steps in securing the arrestee's vehicle and property if the following conditions are present.

Q So what we get down to is the individual officers discretion on the scene, isn't that right?

A Yes.

Q Under subsection B of park and lock procedures, again, if the above conditions which you said that Mr. Bertine's car qualified for, the officer may take the following steps to secure the vehicle; is that correct?

A That's what it says.

Q What does III(B) say?

A Personal items.

THE COURT: I can read it. Let's not go over that.

Q (BY MR. LACKLEN) Officer, that's part of the impoundment regulations, is it not?

A Yes.

Q It says closed containers that give no indication of containing either valuables or a weapon may not be opened and the contents searched?

A That's under (2). I think you said three before.

Q And that's a regulation that was in effect on February 10, 1984, wasn't it?

A Yes.

Q And Mr. Bertine's backpack didn't give any indication of containing either valuables or weapons, did it?

A I couldn't way until I looked in it.

Q But it was a closed container before you looked in it, wasn't it?

A Yes.

Q Once you looked in the backpack and looked -- and you saw the brown zippered

pouch, that was a closed container, wasn't it?

A Yes.

Q And that didn't give any indication of containing valuables or weapons, did it?

A Contained something, I couldn't say if it was valuable or weapons.

Q So you searched it?

A Yep.

Q When you opened the brown zippered container inside the backpack you saw four boxes. They were all closed containers, weren't they?

A Yes.

Q And none of them gave any indication of containing either valuables or weapons, did they?

A I couldn't say.

Q Until you searched them?

A Right.

Q Under subsection (B)(4), you have the authority to drive the vehicle off the

roadway and legally park the vehicle in the nearest public parking area, don't you?

A That's what it says, but I would contest that.

Q Officer, is this a procedure that was still in effect?

What are the dates of this memorandum?

A Effective date is September 7, 1977.

Q When is the expiration date?

A Indefinite.

Q Do you know if this memorandum has been modified or changed in any way?

A I don't believe it has yet.

Q And you were familiar with this on February 10, weren't you?

A Yes.

Q So you knew that you had the authority to move Mr. Bertine's car to a public parking lot, didn't you?

A I knew the policy said I could, yes.

Q But you made your own individual discretionary decision not to do that in this case?

A Yes.

Q And if you had chosen to tape and seal the backpack in it's closed condition and transport it with you to the police department, it could have been placed into property in that sealed, closed condition and Mr. Bertine could have retrieved it when he was released from jail; isn't that correct?

A I personally would not have done it that way, but it could have possibly been done that way.

* * *

Q (BY MR. LACKLEN) Officer, you didn't have any reason to believe that these containers contained contraband, did you?

A I didn't know what they contained.

Q These aren't normal containers in your experience for the storage or

transportation of contraband, dangerous drugs, or controlled substances?

A To my knowledge. This is the first time I have ever seen a can that looks like that.

Q Would it be fair to say that when you saw that can you became somewhat curious about what was inside of it?

A Yes.

Q (BY MR. LACKLEN) Officer Reichenbach, do you think it's possible that there were things in the trunk that you overlooked and didn't inventory?

A Sure.

* * *

REDIRECT EXAMINATION OF OFFICER REICHENBACH BY MR. HARIED [p.80, 1.12 - p.82, 1.7]:

Q You said that you would not have exercised your discretion to move this car and park it in a public area.' Can you explain what factors went into your decision?

A I had no idea if the truck was insured. If I was driving an uninsured truck and have an accident with it, I would be liable.

Q Did you finish your answer? I'm sorry, I didn't --

A Yes, I said I would be liable if I had an accident and I would also be violating the law.

Q Violating the law by driving an uninsured vehicle?

A Right.

* * *

Q From -- when you first picked up the backpack, before you opened it, you could tell that there were items of weight inside?

A Yes.

MR. LACKLEN: Objection. Leading.

THE COURT: It's been asked and answered before in any event.

Q (BY MR. HARIED) Could you tell without looking in whether those items of weight were, for example, a gun?

A I couldn't tell.

Q A knife?

A I couldn't tell.

Q A cherry bomb?

A I couldn't tell.

* * *

DIRECT EXAMINATION OF MALCOLM TOLEN

(TOW TRUCK DRIVER)

BY MR. LACKLEN

[p. 121, l.17 - p.124, l.20]:

Q Could you state your full name and spell you last name?

A Malcolm Frasher Tolen, T-o-l-e-n.

Q Mr. Tolen, how are you employed?

A I am a wrecker driver for Buff Conoco.

* * *

Q Once the vehicle is in neutral, you don't need to have access to the interior

of the vehicle in order to tow it and store it, do you?

A No.

Q Okay. Have you towed vehicles during your experience in Boulder County -- vehicles that you have taken into possession from the Boulder Police Department that have been sealed, the doors have tape on them where you actually couldn't get access to the interior of the vehicle?

A Yes.

* * *

Q Did you take any special procedures with that vehicle versus all of the other cars you towed for the Boulder Police Department?

A Other than being able to put it back into park to lock the wheels. I just had to block them because I couldn't get into it.

* * *

Q I will show you what has been marked as Defendant's Exhibit R for identification, and ask you if you recognize this picture?

A Yes, I do.

Q What does that picture represent?

A That's a section of the fence and part of the gate or part of the fence, anywhere. I don't know if that's the gate or not.

Q Where is that storage lot located?

A Turnpike Ford.

Q It's on the property of Turnpike Ford?

A Yes.

Q It's an open air storage, fenced-in lot?

A Yes.

Q How high is that fence?

A Six feet.

Q Does that go entirely around the storage lot?

A Yes, it does.

Q And is that storage lot kept locked unless somebody from Buff Towing is there?

A Yes.

Q Does any other towing company use that storage lot?

A No.

Q What security is provided in that area by Turnpike Ford or Buff Towing at night?

A Okay. We see that the yard is lighted at night. As far as any other security, I don't know if any supervisor provides any watchman or anything like that. I have seen quite a few in the area.

Q What have you observed when you brought cars there another night or been around there at night? What have you observed?

A I've seen police officers and security officers patrolling the area.

* * *

MR. LACKLEN: Mr. Tolen, to your knowledge has anything ever been stolen out of a vehicle stored in your lot?

A Not that I know of.

* * *

DIRECT EXAMINATION OF OFFICER TOPOREK

BY MR. LACKLEN

[p.134, l.17 - p.139, l.17]

Q And when you left, you asked officer -- the two officers that were there to do an inventory and impound of the car; is that right?

A I asked them to go ahead and impound the vehicle, yes.

Q Before you handcuffed and removed Mr. Bertine from the scene, did you ever discuss with him alternatives of what to do with his vehicle?

A No, I did not.

Q And that's an option that you have as a Boulder police officer in a custodial arrest, is it not?

A If certain variables exist, yes.

Q What are those variables?

A If there would be another licensed driver in the vehicle who, say, had not been drinking that could take control of the vehicle too. If the vehicle was illegally parked in a manner that would be a traffic hazard, then it couldn't be left at the scene.

Q It is an option to move the vehicle to a position where it's legally parked?

A I am not aware of it. I do not exercise that policy.

* * *

Q You don't impound every car you do a custodial arrest of the driver of, do you?

A I would probably say 99 percent of the time, yes, sir. Unless one of those other exists as far as another licensed driver there, if it is on private property, with the owners consent.

Q But you never use the portion of the policy that allows you to move the vehicle to a public parking lot?

A No, sir.

* * *

Q You are familiar with the park and lock procedure of the Boulder Police Department, aren't you?

A Vaguely.

Q You are aware that under the park and lock procedures if the officer decides to park and lock instead of impounds, one of the steps that the officer is to take -- one of the requirements is closed containers that give no indication of containing either valuables or weapon may not be opened and the contents searched, i.e., inventoried. You are aware of that policy in the Boulder Police Department, aren't you?

A If that's what the policy says. But again, I haven't reviewed it for quite

some time, so the exact wording I am not that familiar with.

Q If you are not familiar with the policy itself. Let's talk about the procedures you use when you do an inventory and an impound. Do you follow that regulation of not inventorying or searching a closed container?

A It would depend on the circumstances.

Q And the circumstances would be that the container would have to give some indication of containing either a valuable or weapon?

A Yes. And what my experience has dictated in the past, I guess.

* * *

Q Before you transported Mr. Bertine from the scene, you didn't ask him if he wanted to contact someone to take custody of his vehicle and his dog, did you?

A No, sir.

Q You know that his dog was going to have to go to the humane society and that

he was going to have to pay a fee to get his dog out?

A Most likely, yes.

Q You knew his car was going to be towed for a cost of $25, and $4 or $5 a day storage fee?

A Yes, sir.

Q You didn't give him any options regarding whether he wanted to follow that procedure or some other procedure?

A That's correct.

Q You didn't have any reason to suspect that his car contained any contraband or evidence of a crime, did you?

A No, sir.

Q And you didn't ask him if he wanted his car moved across the street catty-corner from where he was to be parked in the Basemar parking lot -- public parking lot and just locked there and left until he could retrieve it, did you?

A No, sir, I did not.

Q You didn't ask him whether he wanted to waive any liability for any personal items that were in the car even if the car was towed?

A No, sir.

Q Does the Boulder Police Department have a form where if you decide to leave a car on the street, instead of towing it, that the person can sign allowing you to do that? Protect you?

A Are you referring to the park and lock?

Q Make an arrest in the parking lot or a side street where the parking is legal.

Do you ever allow the person to leave his car there?

A If I understand your question, you would be referring to a private parking lot. Again, if it's legally parked off the side of the roadway, then depending on the officer, I would say -- or liability purpose or at least say that the person

did do it on his own accord, I might put it on the impound sheet. Cross cut impound and put park and lock and note per their request vehicle was legally parked and left if they did wish to have the car left there.

* * *

CROSS-EXAMINATION OF OFFICER TOPOREK

BY MR. HARIED

[p.142, 1.3 - 16]:

BY MR. HARIED:

Q Insurance and the lack of insurance and liability have been mentioned as two reasons not to move a car that's illegally parked and move it to a legal parking place. Are there any other reasons that you don't do that?

A For personal reasons. Not knowing his particular automobile. Any type of dysfunctions it may have. I would not, you know, drive a person's automobile.

Q Bad brakes, for example?

A Exactly.

Q Is it standard procedure if a car is to be impounded it's inventoried inside?

Q And out?

A Yes.

* * *

REDIRECT OF OFFICER TOPOREK

BY MR. LACKLEN

[p.142, l.20 - p.143, l.9]:

Q Officer Toporek, pursuant to a normal routine inventory, what kind of things would be inventoried in the car?

A That would I think be very individualistic as far as what an officer may or may not go into. I think whatever arouses his suspicious as far as what may be contained in any type of article in the car. A lot of times the glove compartments, any storage areas, certain containers inside the car could very well be gone through.

Q You wouldn't necessarily go into the smallest containers such as like ashtrays and things like that?

A I would.

Q And what would you been looking for in an ashtray?

A It could be any kind of jewelry, valuable item that is kept in the ashtray. I, a lot of times, myself, will stick a watch in the ashtray.

* * *

III. Ruling Of The Trial Court [Transcript, p.179-84]:

TUESDAY, JULY 10, 1984

PROCEEDINGS

(Defendant and counsel being present, the following proceedings were resumed:)

THE COURT: I've reviewed a number of the authorities that have been cited to me by counsel, as well as the exhibits in the case. And I'm prepared to make findings of fact and conclusions of law.

The Court finds that in the early morning hours of the day in question, the 10th of February, Officer Toporek did have reasonable grounds to believe that the defendant was driving under the influence of alcohol so as to stop him.

After doing so, defendant's responses, the manner of his speech, and the odor of alcohol on his breath gave the Officer probable cause to administer roadside sobriety tests. The defendant failed those tests. And as a consequence, the Court concludes that Officer Toporek was justified in arresting the defendant for driving under the influence and in taking him into custody.

The Court further finds that the Boulder police did follow their standard procedures with this defendant. Exhibit K gives considerable discretion to police officers. There's no duty under their standard procedures to inquire after the arrest, about his desire concerning the

alternative of parking and locking the vehicle.

The Court finds that the decision to impound the vehicle and the decision to do the type of search that was done were both made in good faith and were not due to the defendant's appearance, such as his shoulder-length hair or his full beard, nor due to the age or condition of his vehicle.

The word "inventory" in Exhibit K does mean a detailed inventory involving the opening of containers and the listing of contents. That is what Exhibit K calls for with a vehicle which is impounded. The Court has to find that the inventory in this case was somewhat slip-shod in so far as it related to the contents of the vehicle itself; that is, excluding the contents of Exhibit B, the backpack.

But if one compares Exhibit A, which pertains to the vehicle, and Exhibit L, the inventory pertaining to the backpack,

it becomes clear that the vehicle was inventoried first and the backpack later. And that the inventories were done by different people.

So the Court must conclude that the failure to list all of the contents of the vehicle does not mean that the inventory of the backpack was done in bad faith.

The Court further finds that the defendant did not ask to have the vehicle parked and locked. And the Court finds that there's no duty upon the police in a situation such as this to inquire to one's desire in that respect.

With respect to the criteria set forth in the Counterman case, the Court finds that the search of the backpack was done for the purpose of protecting the owner's property, protection of the police from subsequent claims of loss or stolen property, and the protection of the police from dangerous instrumentalities. It was not a pretext for an investigative search.

However, the Court also find that there were less intrusive means available for securing the property.

The critical items seized were not within plain view. They were inside metal containers, Exhibits C, D, and G, which were in turn inside a zippered bag, Exhibit E, which was in turn inside a zippered backpack. None of these gave any outward indication of containing anything dangerous. As the officers themselves testified, they could not tell what the contents of these various containers were, one way or the other.

The Court has to conclude that that search did not violate the defendant's rights under the Fourth Amendment to the United States Constitution. Case of Illinois against Larayette makes that clear.

The issue presented by this case is whether the state violated defendant's rights under Article 2, Section 7 of the

Colorado Constitution. In People against Grana, 185 Colo. [sic], the defendant was stopped for auto theft, and the car impounded. The search in that case was purported to be incident to the defendant's arrest. And the search extended from the passenger compartment into the trunk of the automobile, where a flight bag, a zippered flight bag, was discovered.

The Court held that because the search continued beyond the passenger compartment into the trunk, it exceeded the reasonable scope of a search incident to an arrest and had to be justified on other grounds. Our Supreme Court has held in other cases that a search incident to an arrest must be contemporaneous with the arrest itself. That was the ruling of People against Vaughns in 182 Colo. 328, and in Glass against The People, at 177 Colo. 267.

So, from the Grana case, the Court must conclude that although the backpack was found in the passenger compartment of the car, and itself could properly be seized incident to an arrest, the search of its contents must be justified as an inventory search.

Now, Grana does not cite the Colorado Constitution, it cites only the Fourth Amendment. The holding in that case is that because there's an expectation of privacy in the zippered flight bag, the search could not be done without a warrant as an inventory search. Counterman case cites not only Grana but also specifically Article 2, Section 7 of the Colorado Constitution. Counterman dealt specifically with a zippered backpack.

I agree with the District Attorney that the Counterman test, the various factors set forth in the Counterman decision, basically boils down to a test of reasonableness. And the mere fact

standing alone that less intrusive means were available does not mean, per se, that the inventory of all the contents was unreasonable.

However, there's no essential distinction on the facts between that case and this one. And I have to conclude on the basis of Counterman that this search, this inventory search as an inventory search, did violate Article 2, Section 7 of the Colorado Constitution.

I appreciate the gist of the Lafayette decision, or the rationale of it. And it may be that it is impossible to draw these fine distinctions as a matter of proper police administration. That becomes an important matter for our appellate courts, because in this case I have found, and would reiterate, that the evidence is clear that what happened here was in accordance with standard police procedure. It was not unusual, it was not specifically aimed at this particular

defendant for any reason. But those policy decisions should be made by the appellate courts, not by this one.

I think it is clear that our Supreme Court has been more protective of private rights against search and seizure than has been the present United States Supreme Court. The Lafayette decision does not overrule the Colorado courts' interpretation of Article 2, Section 7, as set forth in Counterman. And for that reason, I must suppress the contents in this case of Exhibit B, the backpack.

The case may present difficult questions for an appellate policy maker as to just how far you can go into a closed article. Could the police have legitimately inventoried the gross items of the zippered backpack, but not gone into the nylon kit? Could they have gone that far, but not into the metal containers that were in the zippered nylon

bag? I'll leave those questions for the appellate courts.

I find no essential distinction from Counterman, and that has to be the basis of my ruling, until and unless our appellate courts say that they will be interpreting our constitution in accordance with Illinois against Lafayette.

MR. HARIED: Thank you.

THE COURT: Is there anything I've left unaddressed?

MR. HARIED: I don't believe so.

THE COURT: Okay. We'll be in recess.

(The proceedings were concluded.)

IV. Appendix A

PEOPLE'S EXHIBIT K

BOULDER POLICE DEPARTMENT

BOULDER, COLORADO

OFFICE OF THE CHIEF OF POLICE

GENERAL PROCEDURE

DATE ISSUED: 07/19/77

PROCEDURE NO.: 77-GP-0-19

DATE EFFECTIVE: 09/07/77

EXPIRATION: Indefinite

CANCELLED PROCEDURE: None

SUBJECT OF PROCEDURE: MOTOR VEHICLE IMPOUNDS

TO: ALL DEPARTMENT PERSONNEL

I. Purpose

To insure the appropriate care and security of motor vehicles taken into custody by the Department.

II. Procedures

A. Upon placing a motor vehicle in Police custody, Officers shall take the following steps in

securing the vehicle and its contents:

1. If the vehicle or its contents have been used in the commission of a crime, or are themselves the fruit of a crime, the Officer shall conduct a detailed vehicle inspection and inventory and record it upon the VEHICLE IMPOUND FORM.
2. Personal items of value should be removed from the vehicle and subsequently placed into Property for safekeeping.
3. The Officer shall request a Tow Truck, and upon its arrival have the Tow Truck operator sign the IMPOUND FORM, keeping one copy in his possession, before the

Officer releases the vehicle for impoundment in the City of Boulder impoundment facility.

B. The above procedure shall be followed when a vehicle involved in a traffic accident is to be held for evidentiary purposes.

III. Park and Lock Procedures

A. Upon placing the operator of a motor vehicle in custody, Officers may take the following steps in securing the arrestee's vehicle and property IF THE FOLLOWING CONDITIONS ARE PRESENT:

1. The vehicle and/or its contents ARE NOT themselves the fruit of a crime, nor has the vehicle or its contents been used in the commission of a crime.

2. The vehicle has not been involved in a traffic accident requiring its impoundment as evidence.

3. Vehicles should only be parked and locked with approval of the arrestee.

B. If the above conditions exist, the Officer may take the following steps to secure the vehicle:

1. Conduct a detailed vehicle inspection and inventory and record it upon a VEHICLE IMPOUND FORM. When possible, have a second Officer witness this inventory.

2. Closed containers that give no indication of containing either valuables or a weapon may not be opened

and the contents searched. (i.e., inventoried)

3. Personal items of value will be removed from the vehicle and subsequently placed into PROPERTY for safekeeping.
4. The Officer shall drive the vehicle off the roadway and legally park the vehicle in the nearest PUBLIC parking area. The date, time, and location where the vehicle is parked shall be indicated on the IMPOUND FORM.
5. The Officer shall remove the ignition keys, and lock all doors of the vehicle.
6. During the booking process, the arrestee shall be given a continuation form for his signature which indicates

the location of his vehicle. One copy of the continuation form is to be retained in the case file.

7. The arrestee shall be advised of the procedures required in obtaining personal property removed from the vehicle and placed into Property for safekeeping, i.e., TV's, valuables, etc.

8. The ignition key to the vehicle should remain with the items that are transported with the arrestee should this individual be incarcerated.

NOTE: Routine Motor Vehicle Impoundment Procedures should be used if no public parking areas exist in the immediate vicinity of the arrest, or there is reasonable risk of damage or vandalism

to the vehicle, or the arrested individual requests that the vehicle be impounded in the City's storage facility.

C. If the aforementioned conditions exist the Officer may, at his discretion, release the vehicle to a present individual designated by the arrestee after ownership is shown to be held by this individual, and the person so indicated shows proof of holding a valid motor vehicle operators license.